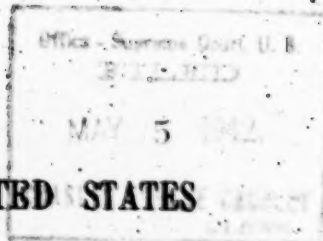




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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1941**

**No. 1216 87**

**THE PUBLIC UTILITIES COMMISSION OF OHIO,  
GEORGE McCONNAUGHEY, CHAIRMAN OF SAID COM-  
MISSION, ET AL.,**

*Appellants,*

*vs.*

**UNITED FUEL GAS COMPANY, ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF OHIO.**

**APPELLANT'S BRIEF IN OPPOSITION TO THE  
MOTION TO DISMISS OR AFFIRM.**

✓  
✓ **THOMAS J. HERBERT,  
KENNETH L. SATER,**  
*Counsel for Appellants.*



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SUPREME COURT OF THE UNITED STATES

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PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,  
*Appellants,*

*vs.*

UNITED FUEL GAS COMPANY, ET AL.

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**ANSWER BRIEF OF THE PUBLIC UTILITIES COMMISSION OF OHIO, ET AL., TO MOTION OF UNITED FUEL GAS COMPANY TO DISMISS THE APPEAL ALLOWED OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENT OF THE DISTRICT COURT.**

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The Portsmouth Gas Company distributes and, at all times mentioned, has distributed natural gas in the City of Portsmouth, Ohio. In February 1932, it appealed to appellant Commission from a two year rate ordinance enacted by the City of Portsmouth; this rate materially reduced the rate theretofore in effect. As a result of the hearings before it the Commission found on April 18, 1935 (Exhibit E attached to respondent United Fuel Gas Company's bill of complaint):

“That, therefore, the rates and charges fixed and prescribed by said ordinance are manifestly unjust,

unreasonable and insufficient to yield reasonable compensation for the service of said The Portsmouth Gas Company; ought not to be ratified or confirmed and that reasonable and just rates and charges should be substituted therefor."

At the same time it found:

"The Commission further finds that, in the absence of proof by the United Fuel Gas Company of a just and reasonable rate or charge to be maintained, imposed, charged and collected by it for the furnishing of natural gas to The Portsmouth Gas Company for distribution to consumers for public and private use in said City, it is unable to determine the just and reasonable rates to be substituted for the rates and charges fixed and prescribed by said ordinance which it has found herein to be unjust and unreasonable."

It then:

"Ordered, That the said United Fuel Gas Company be, and hereby it is notified, directed and required to proceed, forthwith, and with all diligence to prepare and, within ninety days from the date hereof, to complete a presentation of all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to The Portsmouth Gas Company for the furnishing of natural gas for distribution within the City of Portsmouth, Ohio, in conformity to the provisions of the General Session Order of this Commission adopted and promulgated under date of March first, 1934. It is, further,

"Ordered, That this matter be continued for the receipt and consideration of such presentation by the United Fuel Gas Company and the making of such further and other order or orders herein as may be necessary and proper in the premises."

On May 29, 1935, it further found:

"That the gas being delivered to The Portsmouth Gas Company, and which has been delivered to it under



the contract hereinbefore referred to, is produced, and has been produced during all of said time, in the States of West Virginia and Kentucky, and is conveyed, together with other gas from the same sources, through a pipe line in a continuous flow from said points of production in West Virginia and Kentucky to a point in the State of Ohio, where the same is delivered to The Portsmouth Gas Company; that out of the said pipe line said The United Fuel Gas Company also delivers certain other gas from the same sources to a distribution system supplying the town of New Boston, in the State of Ohio, and the City of Ironton, in the State of Ohio, and that the distribution of natural gas in said town of New Boston and the said City of Ironton, aforesaid, is made to the inhabitants of the said municipalities by said The United Fuel Gas Company through a distribution system owned by said The United Fuel Gas Company; and

“That the United Fuel Gas Company and the Portsmouth Gas Company have no connection with each other by way of interlocking directors or unity of interest; neither has any associate, affiliate or parent company of either of said companies, The United Fuel Gas Company and The Portsmouth Gas Company, any such relation, but the two companies are entirely separate and distinct from each other and are so operated. . . .

“The Commission further finds that the furnishing of natural gas by the United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio; that the rates to be charged therefor are subject to the jurisdiction of this Commission; that such jurisdiction includes the right to regulate the rate or price to be charged for such service, and that the exercise of such jurisdiction is necessary for a determination of the matters and things herein at issue before this Commission.”



The Commission then denied a rehearing of its said order of April 18, 1935.

The pertinent portions of Section 614-2, Ohio General Code, on which these findings and orders are based are as follows:

**"614-2. Definitions.**—The following words and phrases used in this chapter unless the same is inconsistent with the text, shall be construed as follows:

• • • • •  
**"Any person or persons, firm or firms, copartnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:**

• • • • •  
**"When engaged in the business of supplying natural gas for lighting, power or heating purposes to consumers within this state, is a natural gas company, or when engaged in the business of supplying natural gas to gas companies or to natural gas companies within this state, is a natural gas company; provided that a producer supplying to one or more gas, or natural gas companies, only such gas as shall be produced by such producer from wells drilled on land owned in fee by such producer or where the principal use of such land by said producer is other than the production of gas, within this state, shall not thereby become a natural gas company. All rates, rentals, tolls, schedules, charges of any kind, or agreements between a natural gas company and other natural gas companies or gas company providing for the supply of natural gas and for compensation for the same, shall be subject to the jurisdiction of the commission whether or not such rates, rentals, tolls, schedules, charges or agreements shall have been agreed upon or put into effect prior to the taking effect of this provision; provided, however, that authority be and hereby is granted to the public utilities commission of Ohio, upon ap-**

plication made to it, to relieve any producer of natural gas, hereinbefore defined as a gas company or a natural gas company, of compliance with the obligations imposed by this chapter, so long as such producer be not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas, or so long as such producer does not engage in the distribution of natural gas to consumers; . . . ."

Four matters we call to the attention of the Court:

1. The above are not findings of interstate commerce. They are findings of jurisdiction under a state statute; continuous flow of gas as found is not necessarily the same as unreduced pressure flow as found in *East Ohio Gas Company v. Tax Commission of Ohio*, 283 U. S. 465, 75 L. Ed. 1171, 51 S. Ct. Rep. 499, cited by respondent. None of the authorities cited by respondent refer to a situation wherein a company retails gas in one city and wholesales gas to an adjoining and contiguous city from the same line and at the same time. No authority of this or any other court of last resort can be found dealing with such a factual situation; it is both novel and, to date, unique.

2. The answer of these appellants to the bill of complaint in the court below specifically denies the interstate character of the transactions between the respondent and the Portsmouth Gas Company.

3. By adopting these findings quoted above in its decision on October 2, 1941, the court below automatically found that appellant Commission has jurisdiction to issue and execute the orders in question; the transaction, consequently, had to be intrastate and within the jurisdiction of such Commission because both it and the court below have now so found.

4. Even if we assume, for the purpose of argument, that the transactions in question were in interstate commerce, the orders quoted above and appealed from do not, of themselves, regulate interstate commerce. They constitute, so far, nothing more than an inquiry as to the basis for a theretofor unknown arrangement and there is nothing in the record to indicate that appellant Commission will change the rates between respondent and the Portsmouth Gas Company even when the orders in question are complied with by respondent. Respondent is in the position corresponding to that held by the gas company in *East Ohio Gas Company v. Federal Power Commission*, 115 F. (2d) 385. Something further must be done by appellant Commission before an appeal lies.

As to the Federal Natural Gas Act, it was not passed until June 1938. The ordinance period in question expired in February 1934. Obviously that Act can have no bearing on this case or on the proceedings before appellant Commission. Had there not been an unavoidable delay in the trial of the case below, this matter would have been terminated long before the Natural Gas Act was ever passed.

Appellant Commission requests permission of this Court to ask why appellee United Fuel Gas Company charges the Portsmouth Gas Company, a stranger dealing at arm's length, 37 cents per M c. f. for gas and the Ohio Fuel Gas Company, an affiliate, at the same time, 25 cents per M c. f. See *Columbus Gas and Fuel Co. v. Pub. Util. Comm.*, 292 U. S. 398.

Respectfully submitted,

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KENNETH L. SATER,  
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